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Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners*,

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATES OF CALIFORNIA, COLORADO, NEVADA, NEW MEXICO, TEXAS, UTAH, AND WYOMING, AS AMICI CURIAE

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The States of California, Colorado, Nevada, New Mexico, Texas, Utah, and Wyoming, through their respective Attorneys General join herein in respectfully requesting that the Court favorably consider the Petition for Certiorari filed in this case to the end that the decision of the court below be reviewed

as to its merits; or if rendered moot by recently enacted legislation or any other circumstances, that it be vacated.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not reported but is printed as Petitioners' Appendix A, pages 1a to 29a.

INTEREST OF THE AMICI CURIAE

The States of California, Colorado, Nevada, New Mexico, Texas, Utah, and Wyoming, who join together in this brief, all depend in large measure upon the waters of the Colorado River System or the Rio Grande River System for the support of their respective economies. Certain waters of these two river systems were the subject of an international treaty between the United States and Mexico effective as of November 8, 1945. (U. S. Treaty Series 994, 59 Stat. 1219 (1945).) The Treaty, signed by the negotiators of the two Nations on February 3, 1944, allotted certain waters of the Rio Grande between the two countries (Article 4), and guaranteed the delivery to Mexico of certain waters of the Colorado River "from any and all sources" (Article 10). On April 18, 1945, following extended debate, the Senate gave its advice and consent to the Treaty only after first adopting 11 reservations (lettered (a) to (k)), and expressly stating:

> ". . . .that these understandings will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will in effect form a part of the treaty. . . ." (Resolution of Ratification, U. S. Treaty Ser. No. 994, 59 Stat. 1219, (1945).)

The President on November 1, 1945, ratified the treaty subject to the Senate reservations.

On November 8, 1945, the instruments of ratification of the treaty and protocol were exchanged, and a protocol of exchange of instruments was signed and announced, which recited a stipulation in the Mexican resolution of ratification that:

> ". . . the Mexican Senate refrains from considering, because it is not competent to pass judgment upon them, the provisions which relate exclusively to the internal application of the treaty within the United States of America and by its own authorities, and which are included in the understandings set forth under the letter (a) in its first part to the period preceding the words 'It is understood' and under the letters (b) and (c)." (Protocol of Exchange, U. S. Treaty Ser. No. 994, 59 Stat. 1219 (1945).)

On November 27, 1945, the President of the United States issued a proclamation which recited all of the Senate reservations, as well as the Mexican resolution above cited, and proclaimed the treaty in force as from November 8, 1945.

The United States Senate reservations to the Mexican Water Treaty were designed to protect domestic water users within the States depending on the waters of the respective river systems. Reservation (c) provides:

> "(c) That nothing contained in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of

water to users within the territorial limits of any of the individual States."*

The court below, after concluding that the Canadian acceptance of the reservation to the Niagara Treaty "was not so much an acceptance as a disclaimer of interest," held that:

> ". . . The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, 'something which we in the United States must settle under our own procedures and laws.' The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent." (Appendix A to the Petition, p. 6a.)

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* Reservation (a) provides (in part):

> "(a) That no commitment for works to be built by the United States in whole or in part at its expense, or for expenditures by the United States, other than those specifically provided for in the treaty, shall be made by the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, or any other officer or employee of the United States, without prior approval of the Congress of the United States. . . ."

Reservation (b) provides:

> "(b) Insofar as they affect persons and property in the territorial limits of the United States, the powers and functions of the Secretary of State of the United States, the Commissioner of the United States Section of the International Boundary and Water Commission, the United States Section of said Commission, and any other officer or employee of the United States, shall be subject to the statutory and constitutional controls and processes. Nothing contained in the treaty or protocol shall be construed as impairing the power of the Congress of the United States to define the terms of office of members of the United States Section of the International Boundary and Water Commission or to provide for their appointment by the President by and with the advice and consent of the Senate or otherwise."

The court below denied effect to the reservation and sustained the jurisdiction of the Federal Power Commission which the Senate's reservation would have specifically withheld. The decision of the court below in thus invalidating the Senate reservation to the Niagara Treaty would also place in doubt the validity of the reservations to the Mexican Water Treaty, if left standing as the law of the land. The Power Authority so argued below. (See *infra* pp. 6-7) This would be to the direct prejudice of the States joining in this brief, for whose protection those reservations were expressly designed.

ARGUMENT

1. The decision of the court below should be reversed or vacated to remove it as a legal precedent for the invalidation of the reservations to the Mexican Water Treaty.

Consent by the United States Senate to the Mexican Water Treaty was conditioned upon the incorporation in the treaty of "reservations" which qualified the domestic powers of the Federal Government to interfere with the administration of water rights by the States in the respective river basins, under the guise of the treaty as a domestic enabling act,* without supplemental legislation by act of Congress. This was a beneficial exercise by the Senate of its designated role in the treaty-making process under the Constitution. The reservations were designed to safeguard the States against any inherent self-executing domestic operation of the treaty disruptive of established federal-state relationships in the field of water resources—relationships traditionally left to the deliberation of the States and the full Congress under other Constitu-

* Cf. *Foster* v. *Neilson*, 2 Pet. 253, 314 (U.S. 1829); *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

tional procedures specifically designed for the problems of domestic federalism, such as interstate compacts, reciprocal state-federal legislation, or legislation by the full Congress under the commerce clause.

The decision of the court below in permitting the Niagara Treaty to stand, but striking down the reservation thereto which had been adopted by the Senate and President as an integral part of the treaty, assumes that the treaty, without the reservation, would have received the necessary consent of the Senate. Clearly, such an assumption would be unjustified in the case of the reservations to the Mexican Water Treaty, for the Senate expressly conditioned its consent to the whole treaty upon the reservations forming "a part of the treaty." However, the rationale of the decision below invalidating the Niagara Treaty reservation even though formally "accepted" by the Canadian Government, would *a fortiori* imperil the Mexican Treaty reservations which the Mexican Government "refrained from considering." Counsel for the respondent Power Authority expressly so argued before the Federal Power Commission:

> "COMMISSIONER CONNOLE: What about the references to the Mexican Water Treaty which provide the means by which the Government will expend funds to build the works—
>
> "MR. JESSUP: I think, Mr. Commissioner, as you yourself pointed out in the discussion of that this morning, in that case Mexico definitely refused to accept certain of the reservations which they said were of solely domestic import to the United States.
>
> "The President, in his proclamation referred to the fact that Mexico accepted the reservations only

in so far as they affected the rights and obligations of Mexico and not otherwise.

"It seems to me clear that if you have a provision which is suggested from our side after the original treaty is signed, and the other party says, 'We don't accept this; we don't deal with this at all because it doesn't affect us', it is impossible to conclude that that provision not accepted by the other party is part of the treaty, because surely you must have mutuality.

"COMMISSIONER CONNOLE: In other words, you would contend that these terms in the Mexican Water Treaty are as invalid as the ones which were attached to the Niagara treaty?

"MR. JESSUP: Yes, indeed, Mr. Commissioner." (Transcript of Oral Argument in *Power Authority of the State of New York* v. *Federal Power Commission*, pp. 151-152.)

Similarly in their brief on appeal to the Court of Appeals below, the Power Authority concluded that the reservations to the Mexican Treaty "were not part of that treaty." (Brief, p. 35.)

In the light of that argument, note the language of the court below, speaking of the reservations to the Niagara Treaty which it struck down (Appendix A to the Petition, p. 7a):

". . . All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

"A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. *But such matter does not become part of the treaty.* . . ." (Emphasis is the Court's.)

2. The decision below should be reversed or vacated because of its importance as a disruptive precedent in the administration and adjudication of water rights in the Colorado River Basin.*

The reservations to the Mexican Water Treaty must be viewed as part of the intricate mosaic of federal-state relationships on the Colorado River developed over the past half century.

The Colorado River Compact signed in 1922, which was the result of many years of controversy and negotiation, contained detailed provisions for the sharing of any future Mexican Treaty among the States of the Upper and Lower Colorado River Basins (Article III (c)). Subsequently, the Boulder Canyon Project Act of 1928 (45 Stat. 1057), the product of over ten years of debate and controversy in the Congress, closely defined the Federal Government's powers over the waters of the river system. Section 13(b) provides:

> "(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact."

When the Mexican Water Treaty was negotiated in 1944, the "reservations" thereto were proposed by the affected States in the Senate to tailor the treaty to the existing "law of the river". The reservations were carefully designed by the Senate to circumscribe any assertion of power by the Federal Government, based

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* The State of Texas is not affected by the Colorado River Compact or the Boulder Canyon Project Act problems referred to here.

on the treaty as self-executing domestic legislation, which would interfere with the existing framework of the Colorado River Compact and the Boulder Canyon Project Act, without a special act of Congress.

The meaning and interpretation of the Colorado River Compact, the Boulder Canyon Project Act, and the Mexican Water Treaty are now at issue in the original action now pending before this Court of *Arizona* v. *California* (Original No. 10), involving the Lower Basin States of Arizona, California, Nevada, New Mexico, Utah and the United States. The United States in its Petition of Intervention in this case "asserts claims, as against the parties to this cause, of rights to the use of water in the Colorado River and its tributaries . . . (b) to fulfill its obligations arising from its international treaties or conventions. . . ." (Petition of Intervention, par. XXX, p. 25.)

The decision of the court below invalidating treaty reservations designed to protect traditional domestic procedures for the solution of domestic problems, if left as an established precedent of Federal law, will have far reaching disruptive consequences in the administration and adjudication of water rights on the Colorado River.

CONCLUSION

The States joining herein as *Amici Curiae* express no opinion as to whether events subsequent to the decision of the court below have rendered it moot. But if so, then, in view of the great importance of the decision as a precedent with respect to intricate problems of federal-state relationships under the Mexican

Water Treaty, the Court should remand and order the judgment of the Court of Appeals below vacated as moot.

Respectfully submitted,

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